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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1062

W. F. WILSON, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court, in the form of Findings of Fact and Conclusions of Law (R. 20–27), is not officially reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 162–164) is reported in 158 F. 2d 564.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 17, 1946 (R. 165). Petition for rehearing (R. 166) was denied by the Circuit Court of Appeals on January 13, 1947 (R. 170). The petition for a writ of certiorari was filed on February 26, 1947. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether persons employed as watchmen, guards, firemen and maintenance men on a Federally owned housing project, the occupants of which are employed in the construction and operation of nearby manufacturing plants, are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (29 U. S. C. Secs. 201–219).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060) are as follows:

SEC. 3. [29 U. S. C. 203].

* * * * *

As used in this Act—

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States * * *
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing,

mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This is a suit for overtime pay, liquidated damages and attorney's fees under the Fair Labor Standards Act. The Dow Magnesium Corporation, as an independent contractor of Defense Plant Corporation (hereinafter referred to as DPC), built and operated a plant for the production of magnesium, in accordance with an agreement be-

tween DPC and Dow Magnesium Corporation, dated October 4, 1941 (R. 38, 163). The Dow Chemical Company, as Lessee of DPC, built and operated a plant for the production of styrene, in accordance with an agreement between DPC and Dow Chemical Company, dated May 1, 1942 (R. 22, 38, 163). Both plants were owned by DPC, and were located in Brazoria County, Texas. All the magnesium produced and the greater part of the styrene produced in these plants were shipped in interstate commerce. (R. 21.) Near the location of the two plants DPC acquired approximately 400 acres of land, and constructed thereon approximately 2,000 houses for rental primarily to the workers engaged in the construction of the Dow magnesium and styrene plants (R. 23, 40). DPC hired a manager to run the housing project (R. 40). There is some evidence that the housing manager was an independent contractor (R. 44), although the courts below found that the manager was not an independent contractor, but an agent of DPC (R. 23, 163).

DPC's rental housing development was entirely separate and independent of the Dow manufacturing plants (R. 78). The management of the development was not subject to control in any way by Dow Magnesium Corporation or Dow Chemical Company (R. 52). The 400 acres of land and the 2,000 dwellings constituted a small town, with graded streets, guards, a fire depart-

ment, water, lights, gas and sewerage. This development was used exclusively for residence, and no production or manufacture of goods of any kind took place thereon. (R. 23, 52.) There was a community center where the people met for religious worship, entertainment and other communal purposes. The development contained a small merchandise store, owned by a nonresident of the development, where goods were sold not only to those who occupied the houses, but to the general public as well. There was a branch post office, and a school attended by approximately 650 children who lived in the development. (R. 23–24, 73, 100–104.)

During the time that the Dow magnesium and styrene plants were being constructed, most, if not all, of the persons who lived in the housing project were employed in constructing the plants, and not in the operation thereof (R. 23, 40, 50, 65). The evidence was not sufficient to support a finding by the District Court as to how many of the persons living in the development, during the period covered by the petitioner's claim, were employed in the operation of the plants (R. 23, 40, 50, 65, 142). A separate housing project was constructed at Lake Jackson to house the persons engaged in the operation of the Dow plants (R. 65, 142).

The plaintiffs were employed by the manager of DPC's rental housing development as firemen,

guards, and operators of the development's water plant. The duties of the firemen were to put out fires, if any, on DPC's housing tract; the duties of the guards were to guard the property of DPC and of the persons living on the housing tract; and the duties of the water plant employees were to aid in the furnishing of water to those who lived on the tract (R. 80, 81, 128). They performed no services either in the plant of Dow Magnesium Corporation or in the plant of Dow Chemical Company (R. 84, 119). They were hired and fired by DPC's housing manager, and their salaries were paid by the manager from funds furnished by DPC (R. 47, 48, 67, 72).

The plaintiffs, eleven in number, brought suit against the Reconstruction Finance Corporation.[1] The District Court decreed judgment for the defendant. The Circuit Court of Appeals affirmed the judgment, holding that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act, in that their services were too remote from commerce and were not necessary to the production of goods for commerce.

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[1] In the District Court, Reconstruction Finance Corporation was substituted for Defense Plant Corporation (R. 20) since the Act of June 30, 1945, 59 Stat. 310, had dissolved Defense Plant Corporation and transferred all its functions, powers, duties and authority, together with all its assets and liabilities, to Reconstruction Finance Corporation.

ARGUMENT

1. The petitioner was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

Whether the persons living in the housing development were engaged in the construction or the operation of the Dow magnesium and styrene plants, the services rendered by petitioner to such persons were not necessary to the production of goods for commerce within the meaning of the Act. Here the services were not rendered at a place where any production was taking place. The petitioner merely helped to maintain a housing development which was physically and managerially separated from the plants where production was taking place. The only connection petitioner had with the production of goods for commerce lay in the fact that the residential development where he worked was inhabited by persons engaged elsewhere in the production of goods for commerce. It is submitted that this is too remote from such production to fall within the coverage of the Act. Remoteness of a particular occupation from the physical processes of production is a relevant factor in drawing the line between what is and what is not necessary to production. *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U. S. 578, 583.

To hold the Act applicable to maintenance employees of a housing project would extend its

coverage to every necessary service, however remote from production, rendered at any time or place to a person engaged in the production of goods for commerce. As the opinion below aptly points out, the petitioner's services benefited the housing occupants not when they were producing goods for commerce, but when they were entirely separated from the production of goods for commerce (R. 164).[2] The mere fact that petitioner's services may have been necessary to the persons living in the development is not controlling, for as this Court said in the *Callus* case, *supra,* at 582, "merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act." We are advised that the Administrator of the Wage and Hour Division has never sought to bring employees such as are here involved within the coverage of the Act.

2. Although this respondent contended in the two lower courts that the manager of its housing

[2] Lower courts have held that original construction of a plant is not production of goods for commerce. *Barbe* v. *Cummins Const. Corp.*, 138 F. 2d 667 (C. C. A. 4); *Noonan* v. *Fruco Const. Co.*, 140 F. 2d 633 (C. C. A. 8); *Parham* v. *Austin Co.*, 158 F. 2d 566 (C. C. A. 5); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 F. Supp. 982 (E. D. Pa.); *Collins* v. *Ford, Bacon & Davis, Inc.*, 66 F. Supp. 424 (E. D. Pa.). But cf. *McCrady Construction Co.* v. *Walling*, 156 F. 2d 932 (C. C. A. 3), certiorari denied, No. 635, November 25, 1946; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88.

development was an independent contractor, so that the plaintiffs would be his employees and not those of DPC, nevertheless, both lower courts found that the manager was an agent of DPC, and that plaintiffs were employees of DPC. If the plaintiffs were employees of DPC, then DPC (as a Federal instrumentality, wholly owned by the respondent, which in turn is a Federal instrumentality, wholly owned by the United States) would not be liable to them since it is not an employer within the meaning of the Fair Labor Standards Act. (Sec. 3 (d).) On the other hand, if plaintiffs are employees of the manager, as independent contractor, then DPC would not be their employer and also would not be liable. In either event, no cause of action against DPC is stated.

3. The petitioner cites the case of *Consolidated Timber Company* v. *Womack,* 132 F. 2d 101 (C. C. A. 9), as being in conflict with the opinion of the Circuit Court of Appeals in the instant case. The *Womack* case, however, is readily distinguishable. In the *Womack* case the plaintiff was a cook, employed by a logging company in a cookhouse operated by the company for its employees. The noon meal, of course, was served during the work day, while the logging employees were engaged in productive work. The facilities furnished by the cookhouse were an integral part of the logging business. The meals were sold at cost to the employees of the logging company, and were paid for by deductions out of wages. In

the present case, the services of the petitioner were of a different nature from those in the *Womack* case. Feeding men while they are at work is quite different from rendering maintenance services to the housing development where they live. The housing project was a completely separate and independent enterprise, and the services of the petitioner benefited the housing occupants when they were entirely separated from productive work.

CONCLUSION

The findings and decisions of the two lower courts are correct and fully in accord with the decisions of this Court and of the lower Federal courts. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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